

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LEON EUGENE MILLER,	)	CASE NO. C04-1289-MJP-MAT
	)	
Petitioner,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	
GARY FLEMING,	)	
	)	
Respondent.	)	
_____	)	

INTRODUCTION

In 2000, petitioner Leon Miller was convicted of two counts of child molestation after a jury trial in a Washington state court. The conviction was based in part on the testimony of three witnesses who recounted the hearsay statements of the seven-year-old victim, who had been found not competent to testify and did not appear at trial. While serving a 66-month sentence, petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. This court granted the petition, finding that the hearsay testimony had violated petitioner's rights under the Confrontation Clause of the Sixth Amendment, as those rights had been articulated by the Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004).

01 The granting of the petition, however, was vacated by the Ninth Circuit Court of Appeals  
02 after the Supreme Court clarified that *Crawford* did not apply to cases on habeas review. *See*  
03 *Wharton v. Bockting*, 127 S. Ct. 1173 (2007). The Ninth Circuit remanded the case to this court  
04 to reconsider whether petitioner's Confrontation Clause rights had been violated, but this time  
05 based upon an analysis of pre- *Crawford* law. *See Miller v. Fleming*, No. 06-35244,  
06 Memorandum Disposition at 3 (March 19, 2007). The court directed the parties to submit  
07 supplemental briefs addressing this issue. They have done so, and having reviewed the parties'  
08 submissions, the court concludes once again that petitioner's rights were violated and the petition  
09 should be granted.

#### 10 BACKGROUND

11 On direct appeal, the Washington Court of Appeals summarized the facts of petitioner's  
12 case as follows:

13 On June 22, 2000, K., a seven-year-old girl, was home with J., her  
14 twelve-year-old sister, and their grandfather. Mr. Miller came to the house to speak  
15 with their father about a car. Although their father was not home, Mr. Miller came  
16 in the house to wait.

17 Mr. Miller sat on the couch and watched television with the two girls. K. had  
18 fallen asleep on the couch. The grandfather left the house to run an errand, while J.  
19 went to clean her room. When J. came back into the room, she saw Mr. Miller  
20 touching K.'s vaginal area.

21 His hand was under K.'s clothes. J. woke K. up and took her outside. J. then  
22 called 911 and told the operator what she had seen. The operator told J. to wait for  
her parents to come home as they would know what to do. When J. got off the  
phone, she could not find K. She went back to the living room and saw K. Mr.  
Miller was touching K. again and she was telling Mr. Miller no. J. again took K. out  
of the house and called the police, who arrived several minutes later.

Officer Blaine Kakuda responded to the call. He spoke with K., who was  
scared and timid. K. told the officer that her dad's friend had put his hand down her

01 pants while she was asleep. She said his hand was inside her underwear. The officer  
02 then arrested Mr. Miller.

03 K. told a nurse at the emergency room that Mr. Miller touched her. She also  
04 told the emergency room doctor that Mr. Miller put his finger where she “peed.” The  
05 doctor noticed scratches on K.’s abdomen. Her vaginal area was red, which was  
06 consistent with irritation or rubbing.

07 Mr. Miller waived his *Miranda* rights and spoke with Detective Hilding  
08 Anderson. Mr. Miller said that K. was climbing on him in a sexual manner, but his  
09 hand was not in her pants. He said he might have accidentally touched her when he  
10 was pushing her away.

11 The State charged Mr. Miller with one count of first degree rape of a child and  
12 one count of first degree child molestation. It later amended the information to one  
13 count of first degree child rape or, in the alternative, first degree child molestation,  
14 and one count of first degree child molestation.

15 (Doc. #18, Ex. 2 at 1-3) (footnote omitted).

16 Prior to Petitioner’s trial, the court held an evidentiary hearing to determine the  
17 admissibility of K.’s hearsay statements to (1) Officer Kakuda, (2) the nurse at the emergency  
18 room (Nurse Martinez), and (3) the emergency room doctor (Dr. Minten). The court found that  
19 K. was not competent to testify at trial, but that her hearsay statements were admissible under  
20 various exceptions to the hearsay rule. The jury found petitioner guilty of two counts of first  
21 degree child molestation, and the court sentenced him to 66 months.

22 Petitioner appealed to the Washington Court of Appeals, which affirmed his convictions.  
(Doc. #18, Ex. 2 at 1). His subsequent Motion for Reconsideration was denied (*id.*, Exs. 8, 9),  
as was his Petition for Review in the Washington Supreme Court. (*Id.*, Exs. 10, 11). On May 27,  
2003, Petitioner filed a Personal Restraint Petition (“PRP”) in the Washington Court of Appeals.  
(*Id.*, Ex. 13). The court dismissed the PRP. (*Id.*, Ex. 14). Similarly, his Motion for Discretionary  
Review in the Washington Supreme Court was denied. (*Id.*, Ex. 16). Petitioner’s state collateral

01 review by way of this PRP thus became final September 30, 2003. (*Id.*, Ex. 19). Petitioner filed  
02 no other PRPs in the Washington courts.

03 Turning to the federal courts, petitioner filed the instant petition for writ of habeas corpus  
04 on May 28, 2004. (Doc. #4). In it, he framed the following ground for relief:

05 “Conviction obtained in violation of the Confrontation Clause of the Sixth  
06 Amendment of the United States Constitution.”<sup>1</sup>

07 (Doc. 4 at 5, 8). He clarified this rather broad assertion in his Reply, where he contends that the  
08 trial court’s admission of K.’s hearsay statements through the testimonies of the three prosecution  
09 witnesses to whom she had made these statements (Officer Kakuda, Nurse Martinez, and Dr.  
10 Minten) violated his rights under the Sixth Amendment. Specifically, he argues that his right to  
11 be confronted with the witnesses against him was violated because he was not afforded the  
12 opportunity to cross-examine K. at the time she made the statements nor during his trial. ( *See*  
13 Doc. 13 at 18). He further claims that the admission of the statements was not harmless error.  
14 (*See id.* at 10-16).

15 After respondent filed an answer and petitioner a reply, the court issued its first Report and  
16 Recommendation (“R&R”) in this matter on December 23, 2004. (Doc. #16). In the R&R, the  
17 court found that petitioner had not properly exhausted his Sixth Amendment claim in state court  
18 because he had not presented the same legal theory to the state court that he used here. (*Id.* at  
19 16). The court further found that petitioner had procedurally defaulted on the claim and had not  
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21 <sup>1</sup> The Sixth Amendment provides in pertinent part that: “In all criminal prosecutions, the  
22 accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const.  
amend. VI.

01 shown a basis for excusing this procedural default. Accordingly, the court recommended that the  
02 petition be dismissed.

03 While the R&R was pending before the district court, the Ninth Circuit Court of Appeals  
04 rendered its decision in *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005), *Opinion Amended on*  
05 *Denial of Rehearing*, 408 F.3d 1127 (9th Cir. 2005), *Rehearing en Banc Denied*, 418 F.3d 1055  
06 (9th Cir. 2005). *Bockting* held that the Supreme Court's decision in *Crawford v. Washington*, 541  
07 U.S. 36 (2004), applied retroactively to collateral proceedings. Because *Crawford* changed the  
08 standard governing claims made under the Confrontation Clause of the Sixth Amendment, the  
09 district court referred the matter back to the undersigned to consider petitioner's claim under  
10 *Bockting/Crawford*. (Doc. #20).

11 After additional briefing was complete, the undersigned recommended granting the petition  
12 in its second R&R. (Doc. #32). The district court disagreed with certain aspects of the R&R but  
13 adopted the overall conclusion and granted the petition. (Doc. #39). Both parties appealed to the  
14 Ninth Circuit. While the appeal was pending, the Supreme Court reversed the Ninth Circuit's  
15 decision in *Bockting*. See *Wharton v. Bockting*, 127 S. Ct. 1173 (2007). Because *Bockting* and  
16 *Crawford* had formed the basis of this court's granting of petitioner's habeas petition, the Ninth  
17 Circuit vacated the court's ruling. See *Miller v. Fleming*, No. 06-35244, Memorandum  
18 Disposition at 3 (March 19, 2007). However, the Ninth Circuit found that petitioner had also  
19 challenged his conviction based upon pre-*Crawford* law, the Ninth Circuit remanded the case to  
20 this court for further consideration.

21 The court directed the parties to file supplemental briefs. (Doc. #61). They have done so  
22 (Doc. #62, #65, #68), and the matter is now ready for review.

01 DISCUSSION

02 Standard of Review under Habeas Statute

03 The Anti-terrorism and Effective Death Penalty Act (“AEDPA”) governs because  
04 petitioner filed his petition here on May 28, 2004. *See Lindh v. Murphy*, 521 U.S. 320, 326  
05 (1997); *Barajas v. Wise*, 481 F.3d 734, 738 (9th Cir. 2007). Under AEDPA, petitioner may  
06 obtain relief only in one of two circumstances: First, he may obtain relief if the state court’s denial  
07 of his claim “resulted in a decision that was contrary to, or involved an unreasonable application  
08 of, clearly established Federal law, as determined by the Supreme Court of the United States.”  
09 28 U.S.C. § 2254(d)(1). “Clearly established Federal law” refers to the holdings, as opposed to  
10 the dicta, of the Supreme Court's decisions. *See Carey v. Musladin*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 649,  
11 653 (2006). A state-court decision is “contrary to” clearly established Supreme Court precedent  
12 if the decision “contradicts the governing law set forth in [the Supreme Court's] cases.” *Williams*  
13 *v. Taylor*, 529 U.S. 362, 405 (2000). A state-court decision is an “unreasonable application” of  
14 federal law “if the state court identifies the correct governing legal rule from this Court's cases but  
15 unreasonably applies it to the facts of the particular state prisoner's case.” *Id.* at 407.

16 Second, petitioner may obtain relief if the state court’s decision was “based on an  
17 unreasonable determination of the facts in light of the evidence presented in the State court  
18 proceeding.” 28 U.S.C. § 2254(d)(2). Federal courts must presume the correctness of the state  
19 court's factual findings, but petitioner may rebut the presumption by clear and convincing  
20 evidence. 28 U.S.C. § 2254(e)(1). Finally, a federal court sitting in habeas jurisdiction must be  
21 convinced that the state court's decision is “more than incorrect or erroneous.” *Lockyer v.*  
22 *Andrade*, 538 U.S. 63, 75 (2003). The state court's decision must be “objectively unreasonable.”

01 *Id.*

02       Here, it does not appear that the Washington Court of Appeals reached the federal  
03 constitutional question that is posed by the instant habeas petition. In such cases, the standard of  
04 review is somewhat different than discussed above. When a state court does not address a  
05 petitioner's federal claim, the Ninth Circuit has held that an independent review of the record is  
06 the only means of deciding whether the state court's decision was objectively reasonable. *See*  
07 *Greene v. Lambert*, 288 F.3d 1081, 1089 (9th Cir. 2002), *citing Delgado v. Lewis*, 223 F.3d 976,  
08 981-82 (9th Cir. 2000). More recently, the Ninth Circuit has stated that when a state court has  
09 not reached an issue, a habeas court's review is "*de novo*." *Nooner v. Norris*, 402 F.3d 801, 810  
10 (9th Cir. 2005), *citing Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

11       The specific issues before the court are (1) what standard to apply to determine whether  
12 the hearsay testimony against petitioner violated the Confrontation Clause; (2) whether, under that  
13 standard, the hearsay statements violated the Confrontation Clause; and (3) if so, whether any  
14 violations had a substantial and injurious effect or influence on the jury's verdict. *See Brecht v.*  
15 *Abrahamson*, 507, U.S. 619, 637 (1993).

16       1. What Standard Applies to Hearsay Statements

17       In its Order directing the parties to submit supplemental briefing, the court requested that  
18 the parties address what standard to apply in assessing whether the hearsay statements violated  
19 petitioner's constitutional rights. (Doc. #61 at 2). This question was important to resolve because  
20 *Crawford* had distinguished between "testimonial" and "nontestimonial" statements and had  
21 limited its application to the former. Although *Crawford* itself clearly no longer applies to the  
22 instant case, respondent had argued to the Ninth Circuit that petitioner still had to meet

01 *Crawford's* requirement of showing that the hearsay statements used to convict him had been  
02 testimonial in nature. *Miller*, No. 06-35244 at 6. Otherwise, respondent argued, petitioner could  
03 not claim that the statements violated the Confrontation Clause.

04 The Ninth Circuit avoided the question of whether petitioner had to show that the  
05 statements used against him were testimonial, as the issue had not been properly briefed by the  
06 parties. Accordingly, after the Ninth Circuit remanded the case here, the court directed the parties  
07 to address the issue in their supplemental briefs. In his supplemental brief, petitioner argues that  
08 *Crawford's* "testimonial/non-testimonial" distinction is no longer relevant because *Crawford* does  
09 not apply retroactively to cases such as petitioner's on habeas review. (Doc. #62 at 9). The  
10 proper standard, petitioner maintains, is whether the statements violated pre-*Crawford* principles  
11 articulated by the Supreme Court in *Ohio v. Roberts*, 448 U.S. 56 (1980) and its progeny, *Lee v.*  
12 *Illinois*, 476 U.S. 530 (1986), *Idaho v. Wright*, 497 U.S. 805 (1990), and *Lilly v. Virginia*, 527  
13 U.S. 116 (1999). (Doc. #62 at 8). In response, respondent counters that after *Crawford*, the test  
14 announced in *Roberts* no longer applies to nontestimonial hearsay. (Doc. #65 at 10-11).  
15 Petitioner, in his reply, contends that on the day that respondent filed his supplemental brief, the  
16 Ninth Circuit supplied the answer to the question of what standard applies to pre- *Crawford*  
17 hearsay statements in *Winzer v. Hall*, No. 06-55327, \_\_ F.3d \_\_, 2007 WL 2080154 (9th Cir. July  
18 23, 2007).

19 In *Winzer*, the Ninth Circuit reviewed a district court's denial of habeas relief to a state  
20 prisoner whose conviction had been obtained based in part on hearsay statements by the victims.  
21 In *Winzer*, a police officer interviewed a mother and daughter a few hours after an argument had  
22 transpired between the mother and her former boyfriend, Marcus Winzer. The mother told the



01 officer that Winzer had threatened them by saying, “I’ll smoke you and your daughter.” *Id.* at \*6.  
02 However, at trial, the prosecutor did not call the mother as a witness. Through the testimony of  
03 the police officer, the prosecutor was able to introduce the statement of the mother that described  
04 Winzer’s threat. Winzer was convicted of making a terrorist threat and was sentenced to nine  
05 years in prison. *Id.*

06 Winzer’s habeas petition was denied by federal district court. On appeal, the Ninth Circuit  
07 began its review by stating that *Crawford* did not apply “because it was decided after Winzer’s  
08 trial and appeal.” *Id.* In the absence of *Crawford*, the Ninth Circuit applied the test announced  
09 in *Roberts*:

10 Under *Roberts*, admission of a hearsay statement does not violate the Confrontation  
11 Clause if [1] “*the evidence falls within a firmly rooted hearsay exception,*” or [2]  
12 *if there are other “particularized guarantees of trustworthiness such that adversarial  
testing would be expected to add little, if anything, to the statements’ reliability.”*

13 *Id.* at \*8 (internal citations and quotes omitted) (emphasis added).

14 The Ninth Circuit in *Winzer* did not discuss the distinction between testimonial and  
15 nontestimonial statements. Applying the two-pronged *Roberts* test, the court found that the  
16 hearsay statements admitted at trial had violated Winzer’s rights under the Sixth Amendment. *Id.*  
17 at \*10. Consequently, the Ninth Circuit reversed the district court’s denial of the habeas petition.  
18 *Id.* at \*12.

19 Respondent has not filed a surreply or any other pleading challenging petitioner’s reliance  
20 on *Winzer* for the proposition that, in the absence of *Crawford*, the correct standard to apply is  
21 *Roberts*’ two-prong test. Accordingly, the court will assess whether the hearsay statements  
22 offered at petitioner’s trial fell into either of *Roberts*’s two exceptions to the Confrontation

01 Clause's general prohibition against use of out-of-court statements.

02 2. Whether Hearsay Statements at Petitioner's Trial Were Admissible Under *Roberts*

03 The prosecutor used three different witnesses to present the victim's statements about  
04 petitioner's actions: Officer Kakuda, Nurse Martinez, and Dr. Minten. The court will address  
05 each in turn.

06 Officer Kakuda

07 As mentioned, Officer Kakuda responded to the 911 call and spoke to K., the victim,  
08 shortly after he arrived at the house. Before K. spoke to the officer, her older sister told her that  
09 she had called the police "because of what [petitioner] did to her." (Doc. #18, Ex. 20 at 194).  
10 K. then told the officer that petitioner had put his hand down her pants while she was asleep.  
11 (Doc. #18, Ex. 2 at 2). K. also said that petitioner's hand was inside her underwear. (*Id.*) The  
12 Washington Court of Appeals found that the admission of Officer Kakuda's testimony, recounting  
13 K.'s statements to him, was not permissible under Washington law. (*Id.* at 5). However, the court  
14 found that the error was harmless, because K.'s older sister J. had testified about the same events.  
15 (*Id.*)

16 Here, it is undisputed that K.'s statements to Officer Kakuda do not fall into a firmly-  
17 rooted hearsay exception, the first prong of the *Roberts* test. Rather, respondent argues that K.'s  
18 statements to Officer Kakuda complied with *Roberts* because the state trial court found her  
19 statements to be reliable and the totality of the circumstances support that determination. (Doc.  
20 #65 at 12-13). In particular, respondent points to the officer's testimony at trial, in which he  
21 stated that, although K. was shy at first, she became more comfortable as the interview proceeded.  
22 (*Id.* at 14-15). Officer Kakuda further testified that K. appeared to understand his questions and

01 gave direct answers, which appeared to him to be truthful. (*Id.*)

02       The court, however, finds that certain aspects of K.'s interview with Officer Kakuda do  
03 not inspire complete confidence in the reliability of her answers. First, as the Washington Court  
04 of Appeals noted, there is "no indication that anyone asked K. whether she understood the  
05 difference between the truth and a lie." (Doc. #18, Ex. 2 at 5). Second, before she spoke with  
06 Officer Kakuda, K.'s older sister told her that she had called the police "because of what  
07 [petitioner] did to her." (Doc. #18, Ex. 20 at 194). Thus, the idea that something bad had  
08 happened was already planted in the young girl's mind. Third, she was timid and Officer Kakuda  
09 was an authority figure. A scared seven-year-old answering questions from a police officer,  
10 immediately after her older sister has told her the reason for the officer's presence, does not  
11 constitute sufficient indicia of reliability, such that cross-examination would have been of  
12 "marginal utility." *Wright*, 497 at 823. Accordingly, the hearsay testimony of Officer Kakuda  
13 violated petitioner's rights under the Confrontation Clause.

14       Having determined that Officer Kakuda's hearsay testimony violated the Confrontation  
15 Clause, the court must further assess whether the error caused substantial and injurious effect or  
16 influence on the jury's verdict. *See Brecht v. Abrahamson*, 507, U.S. 619, 637 (1993). In the  
17 previous R&R, the court concluded that the error did have such an effect (Doc. #32 at 14), and  
18 that conclusion was adopted, and buttressed with further reasoning, by the district court. (Doc.  
19 #38 at 13-14). Respondent takes issue with some of the reasons offered by the district court.  
20 (Doc. #65 at 18-21). However, respondent's objections do not sway this court from its earlier  
21 conclusion that the jury had been substantially influenced by the officer's testimony. Therefore,  
22 the error was not harmless under *Brecht*.

01        Nurse Martinez and Dr. Minten

02        After she was brought to the hospital, K. spoke with an emergency room nurse (Nurse  
03        Martinez) and doctor (Dr. Minten). Her statements to the nurse and doctor were admitted at trial  
04        under a Washington hearsay exception for statements made for medical purposes. *See* Wash. ER  
05        803(a)(4). The Washington Court of Appeals affirmed the admissibility of the statements, but  
06        observed that “[t]his is *not* a firmly rooted exception in cases involving young children.” (Doc.  
07        #18, Ex. 2 at 6-7) (citation omitted; emphasis added).

08        Respondent argues first that under federal law, in contrast, a similar exception has been  
09        held to be firmly-rooted, and that the federal characterization of the exception should trump the  
10        state court’s view. (Doc. #65 at 22, *citing White v. Illinois*, 502 U.S. 346, 356 n.8 (1992)).  
11        However, this argument does not accord proper deference to the state court’s interpretation of  
12        its own evidentiary rules. The court will not supplant the view of the Washington Court of  
13        Appeals with that of the federal courts.

14        Next, respondent argues that the statements made by K. to Nurse Martinez and Dr. Minten  
15        were nonetheless sufficiently reliable to satisfy the second prong of *Roberts*. The Washington  
16        Court of Appeals so held, finding as follows:

17                [K.] had no motive to lie. More than one person heard substantially the same  
18                statements, many of which were spontaneous and were made soon after the incident.  
19                Furthermore, there was an eyewitness to the incident. J. testified about what she saw  
                 and her testimony corroborated K.'s statements. K .'s statements to the medical  
                 providers can therefore be deemed reliable.

20        (Doc. #18, Ex. 2 at 7).

21        Thus, in finding that K.’s statements to the nurse and doctor were reliable, the state court  
22        relied primarily on the fact that K. had told the same story to Officer Kakuda and that K.’s sister

01 J. corroborated her statements. However, these factors are not the proper criteria by which to  
02 measure a statement's reliability. The Supreme Court has specifically disapproved the use of  
03 corroborating evidence to support a hearsay statement's reliability or trustworthiness. *See Wright*,  
04 497 U.S. at 823. Consequently, the state court did not apply the correct standard in reaching this  
05 conclusion.

06       Rather, in light of the totality of the circumstances, it appears that K.'s statements to the  
07 nurse and doctor do not have sufficient indicia of reliability to pass muster under *Roberts*. K.'s  
08 statements came after she had already told her story to Officer Kakuda and her older sister was  
09 present during conversation with Nurse Martinez. These two factors likely had the effect of  
10 making it difficult for K. to retreat from her earlier story or to alter any key details when she  
11 recounted the story to medical staff. While the court does not question the state court's assertion  
12 that K. "had no motive to lie," under *Roberts* and its progeny, the crucial inquiry is not into a  
13 declarant's motives, but whether "evidence admitted under the Confrontation Clause [is] so  
14 trustworthy that cross-examination of the declarant would be of marginal utility." 397 U.S. at  
15 823. Here, due to the factors cited above that may have influenced K.'s statements to Nurse  
16 Martinez and Dr. Minten, the court cannot say that cross-examination would have been of merely  
17 marginal utility. Accordingly, the hearsay testimony of Nurse Martinez and Dr. Minten violated  
18 petitioner's rights under the Confrontation Clause.

19       Having determined that the testimony violated the Confrontation Clause, the court must  
20 further assess whether the error caused substantial and injurious effect or influence on the jury's  
21 verdict. *See Brecht v. Abrahamson*, 507, U.S. 619, 637 (1993). In the previous R&R, the court  
22 concluded that the error did have such an effect, for the following reasons:

01 [T]he court cannot imagine that the jury here was not “substantially  
02 influenced” by the repeated statements by K., through the three witnesses, that  
03 petitioner had touched her in various inappropriate ways. These statements  
04 effectively put K. in the witness stand at petitioner’s trial without being subject to  
cross-examination. Indeed, the prosecutor stated four times in her closing argument  
that the jury had “heard from Katrina.” (Doc. #18, Ex. 20 at 940, 947, 969, 971).

05 (Doc. #32 at 14).

06 In addition, the court notes that the other evidence presented against petitioner – the  
07 testimony of K.’s older sister J. and the physical evidence of the medical exam – was likely not as  
08 influential as the improperly admitted hearsay evidence. As petitioner points out, J.’s testimony  
09 had several inconsistencies (Doc. #62 at 18-19), and the physical evidence was acknowledged by  
10 the prosecutor to be “not helpful.” (Doc. #65 at 25). Under these circumstances, the court finds  
11 that the admission at trial of K.’s statements to Nurse Martinez and Dr. Minten had a “substantial  
12 and injurious effect or influence” on the jury’s verdict. Accordingly, the erroneous admission of  
13 the statements was not harmless and petitioner’s habeas petition should be granted.

#### 14 CONCLUSION

15 For the foregoing reasons, petitioner’s petition for a writ of habeas corpus should be  
16 granted. A proposed Order accompanies this Report and Recommendation.

17 DATED this 20th day of September, 2007.

18 

19 Mary Alice Theiler  
20 United States Magistrate Judge